Poynder On Point

Tug of War

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After 20 years of campaigning by activists, the U.K. has finally got its own Freedom of Information Act (FOIA)—nearly 40 years after similar legislation was passed in the U.S. The new U.K. law means that 59 countries have now introduced FOI legislation and 40 more are in the process of doing so. Are we entering a new era of open government, or will the current spate of legislation prove to be a false dawn?

Although adopted in November 2000, the new U.K. law only came into full force on Jan. 1 of this year. On paper it looks impressive, particularly in light of the longstanding tradition of secrecy among British governments. To find out more, however, I attended a recent briefing on the act, held in the London offices of CILIP.

The Act in a Nutshell

Stephen Perry, information risk management practitioner at the consultancy firm KPMG, explained to attendees that, in theory, the public can now request to see "just about every piece of information … [held by a public body] … that is not of a personal nature."

Specifically, U.K. citizens can ask to see information held by approximately 100,000 public organizations, including central government departments, local authorities, hospitals, museums, schools, universities, and the police. And this info isn't just available to British citizens: Anyone, regardless of who they are or where they reside, can make U.K. information requests.

The act embraces paper records, e-mails, audiotapes and videos, and officials' handwritten annotations in the margins of official documents, as well as official documents prepared by public authority employees on their home computers. Since the law is retrospective, it also means that many older government files that previously would have remained secret for 30 years are now potentially accessible.

Once an FOI request is received, an organization has 20 working days to provide the information. And, apart from postage and photocopying costs, charges cannot be levied for doing so—unless the costs of retrieving the information are greater than £450. In the case of government departments, the threshold is £600.

In addition, every U.K. public organization now has to adopt and maintain a publication scheme detailing what information it will routinely make available, how that information can be obtained, and if there is any charge for it.

There are, however, some types of information that will not be subject to disclosure, including information relating to national security, information that would prejudice international relations or obstruct the police in pursuit of criminals, commercially sensitive information, and confidential information. In fact, with a total of 23 exemptions, public authorities would appear to have plenty of scope for continuing to evade the prying eyes of the public. However, while eight of these exemptions are absolute—e.g., information relating to intelligence and security organizations can never be disclosed—requests for all other types of exempt information still have to pass a mandatory "public interest test" before access can be denied.

In other words, unless the information requested enjoys absolute exemption from disclosure, the organization holding the information will have to establish that the public's interest is better served by nondisclosure than by disclosure. As Perry explained to CILIP delegates: "It will be a balancing exercise: weighing the factors for disclosing and the factors against, and, if the balance is equal, then the information should be disclosed."

And with an independent body called the Information Commissioner's Office (ICO) overseeing the act, those denied access to information can seek an independent review of the decision.

The most controversial element of the new law, however, is the so-called "ministerial veto." This allows any cabinet minister or U.K. law officer to prohibit disclosure, even when the ICO has called for it to be disclosed. Unsurprisingly, there has been considerable debate over the likely impact this veto will have. In an interview last year, director of the Campaign for Freedom of Information Maurice Frankel explained: "[W]e don't know how often it will be used and how willing ministers will be to use it. I'm sure they're not going to be vetoing hundreds of requests, but they only need to veto a handful to close off some important classes of information."

In the short term, however, the greatest problem may simply be that public bodies are overwhelmed with requests they cannot fulfill. Speaking to the U.K. Select Committee on Constitutional Affairs last October, Frankel predicted that the sheer number of requests received (coupled with a general unpreparedness for dealing with them) will, within months, lead to complaints arriving at the ICO "by pantechnicon."

Certainly by December, organizations were beginning to receive postdated requests, suggesting a degree of pent-up demand. Speaking at the CILIP event, however, assistant information commissioner Anne Jones took a more sanguine view. The ICO, she said, expects requests to build up slowly, reaching an anticipated annual figure of approximately 200,000 by 2010.

While the act only relates to public bodies, there are also implications for commercial organizations that do business with them, since public bodies are required to disclose any nonexempt information they hold, even where it has been provided to them by third parties.

One consequence of this is that the act will allow competitors to obtain previously secret information about third-party pricing, tender bids, and customer contact details. Since scholarly publishers and online information providers generally negotiate subscription rates behind closed doors on a case-bycase basis, this will likely cause canny university consortia and competitors to make FOI requests a part of future contract negotiations.

Implications for Information Professionals

What are the implications of the U.K. Freedom on Information Act for librarians and information professionals? David Smith, head of the information management division at the Office of the Deputy Prime Minister, explained that they can expect to play a dual role. First, he told CILIP delegates that librarians might be involved in helping members of the public make FOI requests. Second, since many information professionals work in public bodies, Smith said that they could find themselves helping their organizations improve the management of internal data in order to comply with the act. He added that it is more likely they will be doing the former rather than the latter.

For the moment, however, there remains some uncertainty as to the likely FOI role of U.K. librarians. It is unclear, for instance, whether library holdings are subject to FOI requests. Explaining that such matters would only be established by case law over time, Jones said: "My personal view is that the bulk of what a library does will not fall within the act. While library holdings could be counted, much of the information libraries hold will be available elsewhere and, so, exempt."

Moreover, she added, it is also unlikely that large numbers of the public will turn to librarians when making FOI requests. In a survey conducted for the ICO in May 2004, for instance, only 1 percent of people questioned said they would consult a librarian for help in making a request.

Nevertheless, there was general agreement at the CILIP event that FOI offers the profession an opportunity to raise its profile, both by seeking to educate the public about the new law and by helping their organizations with compliance.

Linda Wishart, head of knowledge and information management at the U.K. Department of Health, said that since the act will inevitably encourage senior management to take a greater interest in where its organization's records are kept and how they are organized, FOI will "shine a spotlight on information management within organizations."

For this reason, said Ceri Hughes, associate director of KPMG's financial advisory services practice, the biggest winners in the profession are likely to be records managers, who could discover that they have ceased being "the poor cousins of the information profession" and begin to ascend "from the basement to the boardroom."

Only Time Will Tell

But how effective will the U.K. legislation prove? "It will be very hard to judge until we have dealt with a good number of complaints," replied assistant information commissioner Phil Boyd. "It may be, for instance, that in 6 months' time we will realize that hundreds of applicants are having problems with a particular issue. But until such time, we will not know how effectively the act is operating."

In short, only time will tell. However, based on 40 years of FOI experience in the U.S., we know that legislation in itself is no "open sesame" to government transparency. Despite the same theoretical 20-day turnaround as in the U.K., for instance, FOI requests in the U.S. are generally subject to huge backlogs, with some cases taking years or decades to resolve.

Indeed, with published FOIA contacts often inaccurate or incomplete and requests frequently lost in the system, merely getting an information query on the right desk in the first place can be well-nigh impossible.

Moreover, many public bodies in the U.S. remain either ignorant of their duty to disclose information or simply happy to obfuscate. A statewide audit of government agencies undertaken by eight Indiana newspapers last year, for instance, revealed widespread noncompliance. One county worker told an undercover journalist that only "an act of God" would make him turn over a public document, and a sheriff in Rush County threatened to jail another reporter on the grounds that by making an FOI request the reporter was attempting to intimidate his staff.

Will the U.K. act suffer the same problems? Not all, perhaps. Even critics agree that the U.K. law offers significant advantages over the U.S. FOIA. Above all, by establishing an independent agency to police the act, the U.K. legislation will enable citizens whose FOI requests are turned down to have the decision reviewed without the expense of going

to court—a remedy not available to U.S. citizens. Many believe that this—combined with the mandatory public-interest test (also absent in U.S. legislation)— will make the U.K. law more accessible and responsive.

But the ultimate test of any FOIA legislation probably lies in the extent to which it is able to create a culture of openness among politicians and bureaucrats. Here the omens in the U.K. are not so good: Even before the law had come into force, critics began complaining that it was being undermined.

In December, for instance, the Department for Constitutional Affairs (responsible for the FOIA) released a revised FOI Code of Practice. This, critics claim, breaches two explicit commitments that ministers gave to Parliament during the passage of the bill. Specifically, they argue, it has relaxed the 20- day rule for the assessment of public-interest issues, and it has given public organizations greater flexibility to accept information in confidence (thereby potentially exempting that information from future disclosure).

Days later came claims that many organizations, particularly government departments, were deliberately destroying sensitive data prior to the introduction of the act. Indeed, The Guardian reported that some Whitehall departments had doubled the number of files they were shredding in advance of the FOIA—a process that the opposition cabinet office minister Julian Lewis described as "a bonfire of the historical records."

Even Tony Blair's department, the Cabinet Office, was implicated, with reports that it had instructed its staff to destroy millions of older e-mails before the January deadline. While the government insisted that this was simply good records management, many disputed this claim, arguing that the timing was not accidental— after the deadline, anyone caught illegally deleting material would be personally liable for obstructive destruction and would risk paying a possible fine of £6,000 or spending 14 days in prison.

Dimming the Spotlight

The press may have overblown these incidents. Cultural change, after all, does not take place overnight. But no government is ever going to be comfortable with FOI. The fact that it took 20 years to persuade the British government to introduce legislation, which was then delayed for more than 4 years, is, perhaps, evidence enough.

This same ambiguity was all too evident when President Lyndon Johnson signed the U.S. Freedom of Information Act in 1966. Last September, broadcast journalist Bill Moyers (who was President Johnson's press secretary) told the Society of Professional Journalists that the president publicly boasted that the legislation underlined how "the United States is an open society in which the people's right to know is cherished and guarded." In private, said Moyers, the president hated the act, referring to it as "the f——— thing" and repeatedly threatening to veto it.

In reality, Moyers added, the U.S. act only saw the light of day after Congressman John Moss fought a 12-year battle. Even then, his elders in Congress "managed to cripple the bill Moss had drafted" and "only some last-minute calls to LBJ from a handful of newspaper editors overcame the president's reluctance [to sign it]."

What this tells us is that FOI has always been and will always be a tug of war between a government's love of secrecy and its citizens' desire for openness. Moreover, politicians and bureaucrats will constantly be on the lookout for an excuse to limit the public's ability to scrutinize their actions. Today, that excuse is terrorism.

Indeed, it may be that the U.K. act— signed on to the statute book in a pre- 9/11 atmosphere—has finally entered the world at the very moment when the tide is beginning to turn against FOI.

Nowhere is this more evident than in the U.S., where, since 9/11, a series of political decisions that are designed to roll back government transparency have been made. Shortly after the terrorist attacks, for instance, federal Web sites were instructed to remove a huge amount of information that was deemed sensitive.

Amonth later, Attorney General John Ashcroft issued a memo stating that the Justice Department would defend in court any federal agency that refused an FOIA request on justifiable grounds—reversing Janet Reno's groundbreaking 1993 memorandum that instructed FOIA officers to "apply a presumption of disclosure" when considering FOI requests.

Then, in November 2001, President Bush signed a memo modifying the Presidential Records Act, with the aim of restricting access to historical presidential papers.

FOI was further undermined a year later when an expansive new "critical infrastructure" exemption was introduced via the Homeland Security Act. This states that critical infrastructure information voluntarily provided to the Department of Homeland Security is no longer subject to disclosure under FOIA. Changes like these, and the powerful signals surrounding the PATRIOT Act, have had a tangible impact on transparency in America. In 2003, for instance, the General Accounting Office reported that 30 percent less information was given out in response to press and public requests, with the higher rate of denials falling under the claim that it would be a "breach of national security."

At a time of heightened terrorist activity, however, aren't such actions sensible? Actually, no, argued Lucy Dalglish, executive director of the Reporters Committee for Freedom of Information of the Press in Arlington, Va. "No one has ever demonstrated that a secret society is a safe society," she told the Hopkinton Crier last December. "As a rule,

citizens are better able to protect themselves and take action when they know the dangers they face, even in the face of terrorism."

Besides, said Alasdair Roberts, FOI specialist and associate professor at the Maxwell School of Citizenship and Public Affairs at Syracuse University, much of the rollback in government transparency has little to do with 9/11, but simply reflects the age-old wish of governments to keep the spotlight turned down.

"The Bush administration—or at least some policy-makers—would like to go back to the pre-Nixon era," said Roberts. "The Cheney/Rumsfeld point of view, for instance, is that transparency has gone too far and is corroding their ability to govern effectively—particularly in a world that now has 24-hour news cycles, more aggressive media, and more aggressive stakeholders and interest groups. In such an environment, government officials everywhere are starting to ask: 'How do we govern effectively in a world like that?'"

And this is not a U.S. issue alone: Many governments that have introduced FOI legislation are starting to feel that they have ceded too much ground in the transparency tug of war and are now looking for ways to "recalibrate" what should and shouldn't be in the public domain.

Perhaps they have a point. After all, some degree of secrecy is essential for effective government. On the other hand, too much secrecy encourages politicians and bureaucrats to become lax, inefficient, or downright undemocratic.

This suggests that the tug of war between governmental secrecy and the public's desire for openness is a healthy one. The aim, however, should not be for either side to win but for a balance of power to be maintained. And, since the public can never match the might of their government in this tug of war, the role of FOI should be to provide a heavyweight anchor on the people's side of the rope.

The danger, therefore, is that if governments start reneging on their commitment to FOI, existing laws will gradually be eroded and new laws could prove ineffectual. As Roberts pointed out, it is clear that some governments already view FOI as little more than window dressing. "Many countries have adopted FOI laws because they want to look good in the eyes of international lenders or groups like Transparency International, and implementation is a serious issue. As such, there remains a whole bundle of impediments to transparency, notwithstanding the law."

Rather than ushering in a new era of open government, therefore, the current spate of legislation could prove to be a false dawn: one more example of government spin over substantive change.

How confident can we be that this will not be the case with the U.K. FOIA? The good news, said Roberts, is that rolling back FOI is on par with putting toothpaste back in the tube. "There will not be a culture of openness in the U.K., but you will see that interest groups and stakeholders will use the law aggressively to change bureaucratic routine so that some information that was previously withheld will now be in the public domain." And that, he added, "will probably be the situation facing most governments [that] introduce FOI legislation."

This assumes, perhaps, that a sufficient number of citizens both know about—and actively exercise—their rights. If they don't, we may indeed see FOI erode over time. With the ICO research revealing that more than 50 percent of people in the U.K. have absolutely no idea what FOI is, the danger is definitely there.

Meanwhile, the question for librarians and information professionals is whether they have a role to play in the FOI tug of war. The answer to that? Probably not.

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